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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE LUIS DIAZ,

Defendant and Appellant.

2d Crim. No. B293810
(Super. Ct. No. 16F-12469)
(San Luis Obispo County)

Jose Luis Diaz appeals a judgment of conviction of commission of a lewd act upon a child (two counts) and misdemeanor child molestation. (Pen. Code, §§ 288, subd. (a), 647.6, subd. (a)(1).)[1] We affirm.

*FACTS AND PROCEDURAL HISTORY*

This appeal concerns sexual acts that Diaz committed against seven and one-half year old L. during a two-day period. At the time, Diaz was temporarily residing with L. and her extended family. On appeal, Diaz challenges the trial court's

[1] All statutory references are to the Penal Code unless otherwise stated.

evidentiary ruling permitting evidence of uncharged sexual offenses committed seven years earlier against a similarly aged child.

In December 2016, Diaz and L.P. met online. Diaz soon moved into the household that L.P. shared with her sister-in-law, P.P., and P.P.'s husband. L.P. had two children, including 10-year-old B., and P.P had two children, L. and an infant. During Diaz's brief stay in the household, he engaged the children with television and videogames and took their photographs.

In the evening of December 11, 2016, L. asked P.P.'s husband for permission to accompany B. and Diaz to the local convenience store. P.P.'s husband, then caring for the infant, consented. Diaz and the two children stepped outside to walk to the store. Diaz soon decided that they required a flashlight for the walk and sent B. inside to obtain one. While Diaz and L. waited outside, Diaz touched L. on her breasts and vagina under her clothing. L. testified that Diaz touched her in "weird places," i.e., her "boobs" and her "privates." The blinds to the residence were drawn and P.P.'s husband then was watching television.

B. returned outside with a flashlight and the three embarked to the convenience store. B. described L. as unusually quiet and nervous during the walk, and not her "super talkative" self.

When P.P. returned home from her employment, she was upset to learn that Diaz left with the two children. P.P. then drove toward the convenience store to find them. She drove along streets in the area and eventually found Diaz and the children walking toward home. After the children entered her vehicle, P.P. instructed: "Please do not take off with anybody that we do not know."

As P.P. put L. to bed that evening, L. informed her that Diaz had molested her by touching her breasts, vagina, and buttocks. Contrary to her usual disposition, L. was nervous and shy as she related the incident. P.P. then drove to L.P.'s employment and informed her of the molestation. Later, P.P. telephoned the police department and then drove L. and B. to the police station to file a complaint.

In video-recorded interviews, Grover Beach Police Officers Sonny Lopez and Brad Carey separately interviewed L. L. informed Lopez that Diaz had molested her the evening of December 10, 2016, at a holiday-light festival, and again on December 11, when they were about to walk to the convenience store, and also on the way home from the store. The touchings at the festival were over her clothing. The prosecutor played the video-recordings at trial.

Diaz soon left the L.P. residence. The following morning, Detective Carey found him near the train station and bus terminal. When Carey approached, Diaz looked immediately to the left and to the right, as though he contemplated fleeing. Carey then arrested Diaz.

*2009 Uncharged Sex Offenses*

In 2008 through June or July 2009, Diaz stayed with C.F., her husband, and their children. Diaz, then separated from his wife, slept on the sofa. Diaz's wife was related to C.F.'s husband and C.F. knew Diaz from extended family gatherings. In 2009, C.F.'s seven-year-old daughter K. informed her that Diaz had been molesting her.

At the time of Diaz's trial, K. was 17 years old. She testified that Diaz molested her on many occasions, including touching her vagina, acts of oral copulation, and sexual intercourse. On one occasion, Diaz showed pornography to K.

and asked her to perform oral copulation. Diaz fled the family home after K. reported some, but not all, of the molestations to her mother. When interviewed by a police officer, K. described only the touchings, but not the oral copulation or sexual intercourse. K. explained that she was embarrassed, uncomfortable, and "scared to talk about it."

At trial, evidence of the uncharged offenses was presented through the testimony of C.F. and K. Diaz objected, asserting that the evidence was "incredibly prejudicial" and had not been established by a preponderance of the evidence. Following argument by the parties, the trial court expressly found the uncharged offenses evidence admissible pursuant to Evidence Code sections 403, 1108, 1101, subdivision (b), and 352. Specifically, the court decided in part that the evidence was not remote in time and would not be too time-consuming.

*Conviction and Sentencing*

The jury convicted Diaz of commission of a lewd act upon a child (two counts) and misdemeanor child molestation. (§§ 288, subd. (a), 647.6, subd. (a)(1).) The trial court sentenced Diaz to a prison term of 10 years; imposed a $6,150 restitution fine, a $6,150 parole revocation restitution fine (suspended), a $120 court operations assessment, and a $90 court facilities assessment; and awarded him 791 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Diaz appeals and challenges the trial court's ruling admitting evidence of the uncharged sexual offenses. His challenges rest on California and federal constitutional grounds.

*DISCUSSION*[2]

Diaz argues that the trial court abused its discretion and violated his constitutional right to due process of law by permitting evidence of the uncharged sexual offenses against K. He asserts that the court abused its discretion by finding the preliminary truth of the uncharged sexual offenses pursuant to section 403 because K.'s testimony was not trustworthy and medical evidence did not support her complaint. Diaz adds that the evidence was inadmissible pursuant to section 352 because it was more inflammatory than the charged offenses, confused the issues, and was time-consuming (nearly one-third of the trial time). He points out that he was not arrested, charged, or convicted of the sexual offenses against K. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405 [prior acts not resulting in convictions increase the likelihood of confusing the issues as jury may be inclined to punish defendant for the prior offenses], superseded by statute as stated in *People v Robertson* (2012) 208 Cal.App.4th 965, 991.)

Diaz asserts that the error is measured by *Chapman v. California* (1967) 386 U.S. 18, 24, as prejudicial constitutional error. (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair"].) He points to inconsistencies in L.'s police interviews and trial testimony and her demeanor during the interviews to argue that she was not a credible witness.

Section 1101, subdivision (a) sets forth the "strongly entrenched" rule that propensity evidence is not admissible to establish a defendant's conduct on a specific occasion. (*People v.*

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[2] All further statutory references are to the Evidence Code.

*Erskine* (2019) 7 Cal.5th 279, 295.) Section 1101, subdivision (b) permits evidence of other crimes, however, when offered as evidence of a defendant's motive, common scheme or plan, intent, or absence of mistake, among other reasons. (*Erskine*, at p. 295.) Degree of similarity of criminal acts is important; the least degree of similarity is required to establish a defendant's intent. (*Ibid.*) The reoccurrence of a similar result tends to negative accident, inadvertence, or other innocent mental state and tends to establish criminal intent. (*People v. Ewoldt*, *supra*, 7 Cal.4th 380, 402.)

Section 1108 provides an exception to section 1101, subdivision (a). (*People v. Erskine*, *supra*, 7 Cal.5th 279, 295; *People v. Williams* (2016) 1 Cal.5th 1166, 1196.) Section 1108, subdivision (a) provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Section 352 sets forth the general rule that the trial court possesses the discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (*Erskine*, at p. 296.) The court's ruling admitting evidence pursuant to sections 1101, 1108, and 352 is reviewed for an abuse of discretion. (*Erskine*, at p. 296; *Williams*, at p. 1196 [sexual offense evidence presumed admissible].) Our Supreme Court has long held that evidence of uncharged sex offenses does not violate the federal Constitution's due process guarantee. (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 827; *Williams*, at p. 1196.)

Moreover, the trial court has the authority to determine the existence of a preliminary fact, such as the commission of prior sexual offenses. (§ 403; *People v. Melendez* (2016) 2 Cal.5th 1, 23; *People v. Lucas* (1995) 12 Cal.4th 415, 466.) The decision whether the foundational evidence is sufficiently substantial is a matter within the court's discretion. (*Lucas*, at p. 466.) "The court should exclude the proffered evidence only if the 'showing of preliminary facts is too weak to support a favorable determination by the jury.' " (*Ibid.*)

Evidence of prior sexual offenses proffered pursuant to section 1108 requires the court to undertake a "careful and specialized inquiry" to determine whether the danger of undue prejudice from the propensity evidence substantially outweighs its probative value. (*People v. Erskine*, *supra*, 7 Cal.5th 279, 296.) Among the other factors to consider are the nature, relevance, and remoteness of the evidence, the degree of certainty of its commission, the likelihood of confusing, misleading, or distracting the jurors, its similarity to the charged offenses, the burden on defendant to defend against the charge, any prejudicial impact on jurors, and the availability of less prejudicial alternatives to its outright admission. (*Ibid.*)

The trial court did not abuse its discretion by determining that the prosecutor met his burden of establishing the existence of the uncharged acts against K. by a preponderance of the evidence. (§ 403; *People v. Lucas*, *supra*, 12 Cal.4th 415, 466.) K. informed her mother of Diaz's acts within a reasonable time of their occurrence. K.'s mother corroborated some of K.'s testimony and promptly reported the molestations to the police. The final determination of K.'s credibility was, of course, a jury question, but the prosecutor's showing was sufficient by a preponderance of evidence. (*Lucas*, at pp. 466-467.)

Also, the trial court did not abuse its discretion in admitting evidence of the uncharged crimes committed against K. There are many similarities to the molestations that Diaz committed against K. and L. The girls were similar ages, the molestations initially were over clothing, and Diaz touched his victims in risky situations. Diaz also was living temporarily in each household and left quickly when his acts were revealed. Any dissimilarity between the uncharged offenses against K. and the charged offenses against L. does not compel exclusion of evidence of the uncharged offenses. (*People v. Cordova* (2015) 62 Cal.4th 104, 133 [it is enough that the charged and uncharged offenses are sex offenses within section 1108]; *People v. Escudero* (2010) 183 Cal.App.4th 302, 306 [evidence demonstrated defendant took advantage of vulnerable females regardless of their ages].) Moreover, a "time gap alone does not compel exclusion of the evidence." (*Cordova*, at p. 133 [defendant did "not point to any evidence that his character changed over the relevant time period or offer any reason that such a change might have occurred"].) In *Cordova*, the time gap was 13 and 18 years respectively for other sex offense convictions. (*Id.* at p. 133.) Here the time gap was only seven years.

Diaz disagrees with the trial court's weighing of the section 352 factors. The court's decision was reasonable, however, and not an abuse of discretion. Many more witnesses testified regarding the charged offenses against L., but only K. and her mother testified regarding the uncharged offenses. Their testimony was set forth in 52 pages of reporter's transcript, including direct and cross-examination.

Although the sexual offenses committed against K. were abhorrent and included more than mere touching, the evidence was more probative than unduly prejudicial. The uncharged

sexual offenses evidence reflected frequent sexual acts against a seven-year-old girl in a home environment or family setting. "The fact that defendant committed a sexual offense on a particularly vulnerable victim in the past logically tends to prove he did so again with respect to the current offenses." (*People v. Cromp* (2007) 153 Cal.App.4th 476, 480 [prior offense of rape of developmentally disabled woman not so dissimilar to molestation of four- and eight-year-old boys].)

Finally, the trial court instructed regarding the jury's duty to weigh evidence and determine witness credibility, the presumption of innocence, the prosecutor's burden of proof, and consideration of uncharged and charged sex offenses. (CALCRIM Nos. 103 [reasonable doubt], 104 [evidence], 105 [witnesses], 220 [reasonable doubt]. 226 [witnesses], 375 [evidence of uncharged offense], 1191A [evidence of uncharged sex offense], 1191B [evidence of charged sex offense].) We presume the jury understands and follows the court's instructions. (*People v. Myles* (2012) 53 Cal.4th 1181, 1212.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Jesse J. Marino, Judge

Superior Court County of San Luis Obispo

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